Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

B.C. ROGERS PROCESSORS, INC., B.C. ROGERS POULTRY, INC., CHOCTAW MAID FARMS, INC., FOREST PACKING COMPANY, INC., MARSHALL DURBIN, INC., MARSHALL DURBIN FOOD CORPORATION, MARSHALL DURBIN POULTRY, INC., MARSHALL DURBIN OF TUPELO, INC. AND MOHAWK PACKING COMPANY,

Petitioners,

v.

THE BOC GROUP, INC., LIQUID AIR CORPORATION and LIQUID CARBONIC INDUSTRIES CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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83 pp

QUESTIONS PRESENTED FOR REVIEW

When a case has been transferred for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407, whether the transferee court's jurisdiction to try the case may be established by waiver, consent or stipulation of the parties, and, if so, whether such waiver, consent or stipulation is established by a party's signing of a pretrial order which states that the transferee court has subject matter jurisdiction.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following were parties to the action below: Foster Poultry Farms Company, McCarty Farms, Inc., and McCarty Foods, Inc.

Foster Poultry Farms Company, a California corporation, has not joined in this Petition, because Foster Poultry filed its individual action in the United States District Court for the Middle District of Florida after the Judicial Panel on Multidistrict Litigation consolidated all of the cases in that district for pretrial proceedings. Foster Poultry would have tried its case in the Middle District of Florida, unless the district court transferred it pursuant to 28 U.S.C. § 1404(a). McCarty Farms and McCarty Foods are not parties to this proceeding, having been purchased by Tyson Foods, Inc.

Parent companies of the parties are as follows: Liquid Air Corporation is a wholly owned subsidiary of Air Liquide America Corporation, which is in turn a wholly owned subsidiary of Air Liquide, S.A. (France); Liquid Carbonic Industries Corporation is a wholly owned subsidiary of Praxair, Inc.; BOC Group, Inc. is a wholly owned subsidiary of BOC Group PLC (UK). McCarty Foods, Inc. and McCarty Farms Inc. are wholly owned subsidiaries of Tyson Foods, Inc. None of the other parties to this action have either parent companies or non-wholly owned subsidiaries which are not themselves parties to the action.

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PETITION FOR WRIT OF CERTIORARI

Petitioners B. C. Rogers Processors, Inc., B. C. Rogers Poultry, Inc., Choctaw Maid Farms, Inc., Forest Packing Company, Inc., Marshall Durbin, Inc., Marshall Durbin Food Corporation, Marshall Durbin Poultry, Inc., Marshall Durbin of Tupelo, Inc., and Mohawk Packing Company respectfully petition this Court to issue a writ of certiorari to review the October 10, 2000 judgment of the United States Court of Appeals for the Eleventh Circuit in favor of Respondents, The BOC Group, Inc., Liquid Air Corporation, and Liquid Carbonic Industries Corporation, in *State of Florida, et al. v. Liquid Air Corporation, et al.*

OPINIONS BELOW

By Order dated June 26, 1998, this Court granted Petitioners' prior Petition for Writ of Certiorari, vacated the judgment which had been entered against Petitioners, and remanded the case to the United States Court of Appeals for reconsideration in light of this Court's ruling in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998). Following remand by this Court, the Court of Appeals re-entered judgment against Petitioners, holding that Petitioners had waived any right to complain of the district court's decision to force the case to trial in the Middle District of Florida, by inviting the district court to erroneously assume jurisdiction to try the cases. The Court of Appeals opinion, [App. 1a-13a], was published at 229 F.3d 1321, *sub nom State of Florida v. Liquid Air Corporation.*

Prior to the original Petition for Writ of Certiorari, the Court of Appeals had affirmed, without opinion, the decision of the United States District Court for the Middle District of Florida. [App. 14a-15a]. This per curiam affirmance, also styled *State of Florida v. Liquid Air*, is reported at 136 F.3d

139. The unpublished orders of the United States District Court for the Middle District of Florida (Peter Hill Beer, J., sitting by designation) and of the Judicial Panel on Multidistrict Litigation, [App. 16a-17a], are included in the appendix to this petition, along with the order of the Eleventh Circuit denying the Petition for Writ of Mandamus. [App. 20a-21a]. The trial judge entered no written opinions in connection with any of the issues raised in this Petition. Excerpts from the transcript of the February 6, 1996 hearing on Plaintiff's motion for suggestion of remand are included in the appendix in lieu of a written opinion. [App. 24a-33a].

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit, following remand from this Court, was entered on October 10, 2000. [App. 1a-13a]. This petition for writ of certiorari is filed within ninety days from that date. 28 U.S.C. Section 2101 (c).

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THE REVIEW

The statutory provision directly involved in this petition is 28 U.S.C. § 1407(a) which provides in pertinent part:

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers

> for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, that the panel may separate any claim, cross_claim, counter_claim, or third_party claim and remand any of such claims before the remainder of the action is remanded.

A statutory provision which is indirectly involved is 28 U.S.C. 1404(a), which provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

A. Introduction

This is an antitrust action, brought pursuant to Section 1 of the Sherman Act, 15 U.S.C. § 1, by users of bulk liquid carbon dioxide (CO_2). Respondents, BOC (which also does business under the name "Airco"), Liquid Air (which at times did business under the name "Cardox") and Liquid Carbonic Corporation, who were defendants below, are the major producers of that product. Petitioners (plaintiffs below), all of whom are end users of CO_2, alleged that these producers conspired to allocate customers among themselves and fix prices.

B. Prior Proceedings In This Case

1. Factual Background

Numerous cases in which customer allocation and price fixing claims were asserted against Respondents were filed in district courts around the country beginning in approximately April, 1992. These included an action which the State of Florida filed in the United States District Court for the Middle District of Florida. The various cases were transferred to the Middle District of Florida by the Judicial Panel on Multidistrict Litigation for consolidated pretrial proceedings, pursuant to authority granted by 28 U.S.C. § 1407.

The Florida district court subsequently certified a nationwide class of users of CO_2. A group of the Petitioners, who are Mississippi-based poultry processors, opted out of the class and filed an individual action in the United States District Court for the Southern District of Mississippi in September, 1994. Petitioner Mohawk Packing Company, filed its individual suit in the Northern District of California on July 21, 1993.

The Mississippi and California actions were transferred to the Middle District of Florida as tag-along actions by order of the Judicial Panel. Transfer was ordered for consolidated or coordinated pretrial proceedings only.

2. The Decision of the District Court

Petitioners seek review by this Court of the § 1407 transferee district court's decision to keep these cases in the Middle District of Florida for trial, and the court of appeals' subsequent affirmance of that decision. Although no order transferring the actions to the Middle District of Florida for all purposes was ever entered, the court set the cases for consolidated trial in that district commencing on February 5, 1996. At the time the trial setting was made, there were five distinct groups of plaintiffs, which were: the State of Florida, the certified class of CO_2 users, and three groups of opt-out plaintiffs -- the Mississippi Plaintiffs, the California Plaintiffs, and a large group of plaintiffs headed by Anheuser-Busch[1].

On the appointed day for trial, Respondents announced that they had settled with the class, the Anheuser-Busch group, and the State of Florida. Upon learning that the Mississippi and California Plaintiffs had not yet settled, the district judge announced his intention to remand those cases to Mississippi and California for trial. [App. 26a-28a].

Following that announcement, counsel for BOC met with the judge outside the presence of any attorneys representing either the Mississippi or California Plaintiffs. In that meeting, the district judge has admitted that counsel for BOC convinced him

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[1]In the transcript of the February 6, 1996 hearing which is included in the Appendix to this Petition, the Anheuser Busch group of opt-out plaintiffs is referred to as the Freeman plaintiffs, because they were represented by the Chicago firm of Freeman, Freeman & Salzman.

> That a great amount of money was being paid in the settlement, a huge amount of money had been expended in connection with the litigation process, and the one thing that the defendant required in terms of the management of the matter at that point in time was that it be – that it all be resolved.
>
> There wasn't any – there wasn't even a discussion about venue or anything else, it was simply that it all be resolved, i.e., that this be the forum, that this be the place of resolution of the balance of the case. That was the entirety of their contentions to me.
>
> And I thought that that was okay under the circumstances. My feeling was well, if I can bring that to the process, okay, I will do it.

[App. 29a-30a].

The district judge then announced his intention to keep the remaining cases in the Middle District of Florida for trial. Petitioners filed a motion for suggestion of remand, arguing that the district judge was required by § 1407 to notify the Judicial Panel on Multidistrict Litigation that pretrial proceedings were completed and that the cases were ready to be remanded. The district judge denied this motion, stating on the record that his denial was based on the commitment he had made to defense counsel to resolve all of the cases in Florida.. [App. 32a].

Petitioners sought review of the order denying their motion for suggestion of remand by Petition for Writ of Mandamus to the United States Court of Appeals for the Eleventh Circuit and by petitioning the Judicial Panel on Multidistrict Litigation to remand the cases. The Eleventh Circuit denied the petition, stating that the issues raised could

be reviewed on appeal, if necessary. [App. 20a-21a]. The Judicial Panel on Multidistrict Litigation issued no response to the petition for remand until after the jury had returned a verdict against Petitioners, and then denied the petition as moot. [App. 16a].

The case went to trial on March 5, 1996. After two weeks of trial, the jury returned a verdict for Respondents. Petitioners timely filed a Motion for New Trial, again raising the issue of the trial court's authority to keep these cases in Florida for trial. [App. 34a-35a]. The trial court denied the motion, without written opinion, by order dated April 30, 1996. [App. 18a]

3. The Decision of the Eleventh Circuit on Direct Appeal

Petitioners filed a timely notice of appeal to the United States Court of Appeals for the Eleventh Circuit, contending, *inter alia*, that the district judge had erred in keeping the cases for trial. By letter dated December 29, 1997, while the appeal was pending, Petitioners informed the Eleventh Circuit that this Court had granted certiorari in *Lexecon* and requested that the Court of Appeals withhold its ruling on their appeal until after this Court rendered its decision in *Lexecon*. [App. 50a-51a]. The case was set for oral argument on January 15, 1998. During the course of that argument, the panel focused entirely on the issue of the trial court's refusal to remand and whether that was not simply a venue issue. On January 29, 1998, the Court entered its one word affirmance, without any explanation of why Petitioner's appeal was without merit or of why the Court would not await this Court's opinion in *Lexecon*. [App. 14a-15a].

4. This Court's Grant of Certiorari

Petitioners timely filed a petition for writ of certiorari with this Court, seeking review of the decision of the district

court to keep the cases for trial and of the Eleventh Circuit's order affirming that decision. This Court granted the writ, vacated the judgments below and remanded the case to the Eleventh Circuit for reconsideration in light of this Court's opinion in *Lexecon*.

5. The Eleventh Circuit's Opinion on Remand

Approximately six months after this Court entered its order remanding the case to the Eleventh Circuit for reconsideration, that court directed the parties to simultaneously file letter briefs explaining why *Lexecon* applied to the facts of this case. Although Petitioners' brief focused on (1) whether the § 1407 transferee judge acted without jurisdiction when he retained the cases for trial; and (2) whether *Lexecon* should be applied retroactively, [App. 52a-63a], the Eleventh Circuit held that Petitioners had invited the trial court to try the cases in Florida and could not be heard on appeal to complain of error which Petitioners had invited the trial court to make. [App. 1a-13a]. In so doing, the court of appeals ignored the central issue before it – whether the absence of authority in a § 1407 transferee court to transfer cases to itself for trial, which was clearly recognized by this Court in *Lexecon*, amounted to a lack of jurisdiction, and, if so, whether the parties could confer such jurisdiction by waiver or agreement.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED PURSUANT TO RULE 10 BECAUSE THE DECISION OF THE COURT OF APPEALS ADDRESSES AN IMPORTANT FEDERAL QUESTION IN A MANNER INCONSISTENT WITH RELEVANT DECISIONS OF THIS COURT.

In the instant action, the United States Court of Appeals for the Eleventh Circuit has ruled in a manner that is inconsistent with this Court's opinions in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998) and in *Hoffman v. Blaski*, 363 U.S. 335, 80 S.Ct. 1084, 4 L.Ed.2d 1254 (1960).

Specifically, on remand for reconsideration in light of the *Lexecon* decision, the Court of Appeals (1) assumed, without explanation, an answer to a question left open in *Lexecon*, and (2) that assumed answer is directly contrary to this Court's holding in *Hoffman*.

In their brief before the court of appeals following remand, Petitioners contended that this Court's holding in *Lexecon* established the proposition that § 1407 deprived a transferee court of jurisdiction to try cases transferred to it under authority of that statute. Petitioners further argued that such jurisdiction could not be conferred by consent, stipulation or waiver, citing, *inter alia*, *Hoffman v. Blaski*. [App. 54a-58a]. The Court of Appeals entirely ignored that argument, and without even addressing whether it was dealing with a question of jurisdiction or venue, held that because Petitioners had argued against BOC's motion for multiple trials and had signed a pretrial order which stated that the transferee court had jurisdiction over the subject matter, they were estopped by the doctrine of "invited error" from asserting that the trial court had erred in ordering the cases to trial in the Middle District of Florida.

In *Lexecon*, this Court reserved the question whether a party could waive an objection to a § 1407 transferee court's assertion of jurisdiction to transfer the case to itself for trial. *Lexecon*, 523 U.S. at 36, n.1, 118 S.Ct. at 962, n.1, 140 L.Ed.2d at 73, n.1.[2] However, this Court had already answered an essentially identical question in the negative in *Hoffman v. Blaski*. In *Hoffman*, the issue, as identified by this Court, was "whether a District Court, in which a civil action has been properly brought, is empowered by § 1404(a) to transfer the action, on the motion of the defendant, to a district in which the plaintiff did not have a right to bring it." *Hoffman*, 363 U.S. at 336, 80 S.Ct. at 1085, 4 L.Ed.2d at 1257.

Section 1404(a) is clearly a venue statute, as is § 1407, in that both deal with the issue where certain litigation proceedings will take place. However, both of those code sections place limitations on the power of the district courts to act, i.e. jurisdictional limitations. Section 1404(a) authorizes district courts, under stated circumstances, to transfer a case only to "any other district or division where it might have been brought." 28 U.S.C. 1404(a). *Hoffman* involved two separate cases which were considered together by this Court. In each of the cases the defendants had successfully moved for a § 1404(a) transfer to a district court in which the action could not have been brought. The United States Court of Appeals for the Fifth Circuit upheld one such order, while the Seventh Circuit reversed the other. This

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[2] In footnote 1 to the *Lexecon* opinion, this Court at least suggested that 28 U.S.C. § 1406(b) might contain an answer to whether a § 1407 transferee court's exercise of jurisdiction to try cases so transferred could be waived. That subsection was meant only to codify the existing common law principle that objections to venue are waivable, but waiver of a venue objection will not deprive the court of jurisdiction that has otherwise been conferred by Congress in keeping with Article III of the Constitution. (See Revision Notes and Legislative Reports comment on the 1948 Act following 28 U.S.C.A. § 1406). The flip side of that same coin is that the parties cannot, by waiver or otherwise, confer on the court jurisdiction which Congress has withheld.

Court held that § 1404(a)'s limitation of transfers to districts or divisions where the action could have been brought limited both the jurisdiction of the district courts to transfer and the jurisdiction of the transferee courts to entertain a transferred action. Specifically, this Court said

> It is not to be doubted that the transferee courts, like every District Court, had jurisdiction to entertain actions of the character involved, but it is obvious that they did not acquire jurisdiction over these particular actions when they were brought in the transferor courts. The transferee courts could have acquired jurisdiction over these actions only if properly brought in those courts, or if validly transferred thereto under § 1404(a). Of course, venue, like jurisdiction over the person, may be waived. A defendant, properly served with process by a court having subject matter jurisdiction, waives venue by failing seasonably to assert it, or even simply by making default. (Citations omitted). But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant, but rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff.

Hoffman, 363 U.S. at 343, 80 S.Ct. at 1089, 4 L.Ed.2d at 1261.

The unambiguous holding of this Court in *Hoffman* was that although § 1404(a) is a venue statute, it also limits the power of the district courts to transfer actions. This limitation affects the jurisdiction of the district courts. Because the issue is one of jurisdiction, parties to an action cannot grant the district court the power to transfer an action

in violation of that limitation, by motion to transfer, by stipulation to venue and personal jurisdiction in the proposed transferee court, or by any other action which amounts to a waiver of objection to the transfer itself or the jurisdiction of the transferee court.

As this Court held in *Lexecon*, § 1407 also limits a transferee court's power to try cases transferred pursuant to that statute, by mandating that the cases be remanded to the districts in which they were filed following the conclusion of pretrial proceedings. *Lexecon*, 523 U.S. at 40, 118 S.Ct. at 964, 140 L.Ed.2d at **76**. Application of this Court's holding in *Hoffman* leads inescapably to the conclusion that a § 1407 transferee court's power to try cases, clearly and unequivocally withheld by Congress, cannot be conferred on the transferee court by waiver, consent or stipulation of the parties; nor can parties be estopped to complain of the district court's erroneous assertion of jurisdiction which it did not possess, because they signed a pretrial order which stated that the transferee court had subject matter jurisdiction.[3]

Petitioners made precisely this argument to the Eleventh Circuit following remand. Without mentioning *Hoffman*, that Court re-entered judgment against Petitioners, holding that they had waived any right to object to the district court's ordering the cases to trial in the Middle District of Florida.

Petitioners have raised this issue, in one form or another, seven separate times before four different judicial

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[3]Because this was an antitrust action, in a general sense all United States District Courts would have jurisdiction over its subject matter. Petitioners stated no more than that in signing the Pretrial Order. Even if a party could, by stipulation or consent, confer on the court jurisdiction that was withheld by Congress, the simple act of acknowledging that the transferee court had jurisdiction over cases of this type certainly could not amount to Petitioners' inviting the district court to commit error. This is particularly true in light of Petitioners' later assertion by motion that the district court lacked jurisdiction to do anything other than notify the Judicial Panel on Multidistrict Litigation that the case was ready to be remanded.

bodies. Other than this Court's grant of certiorari, none of those tribunals has yet addressed the argument in any fashion. The holding of this Court in *Lexecon* directly supports the argument that Petitioners have made repeatedly in the courts below and this Court's holding in *Hoffman* mandates a result other than that reached by the United States Court of Appeals for the Eleventh Circuit.

The issue presented by this petition has implications far beyond the limited § 1407 context. The Eleventh Circuit's ruling has application in any case where there is a statutory limitation on the power of the district courts to take action. Should the Eleventh Circuit's decision be allowed to stand, much of the law concerning the jurisdiction of the federal courts and the power of litigants to alter that jurisdiction by waiver, consent, or stipulation is brought into question.

Issuance of a writ of certiorari is appropriate to correct the erroneous ruling of the Court of Appeals, which is in direct conflict with this Court's holdings in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach* and *Hoffman v. Blaski*. This Court should grant *certiorari* in this case and summarily reverse the judgment entered against Petitioners by the United States District Court for the Middle District of Florida and affirmed by the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,
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(any footnotes trail end of each document)

No. 96-2704.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

In Re: CARBON DIOXIDE INDUSTRY ANTITRUST LITIGATION, State of Florida, ex rel., et al., Plaintiffs, Foster Poultry Farms and Mohawk Packing Company, B.C. Rogers Processors, Inc., et al., Plaintiffs-Appellants, v. Liquid Air Corp., et al., Defendants-Appellees.

October 10, 2000, Decided

October 10, 2000, Filed

COUNSEL:
For B.C. Rogers Processors, Inc., et al, Appellant: Melvyn L. Segal, Forster & Segal, San Jose, CA. Kenneth A. Rutherford, The Allred Law Firm, Oxford, MS. Richard L. Jones, Alston, Rutherford & Van Slyke, Jackson, MS.

For Liquid Air Corp., Appellee: William G. Schopf, Jr. Arthur J. Howe, Patrick J. Heneghan, John A. Cashman, Schopf & Weiss, Chicago, IL. Michael J. Abernathy, Bell, Boyd & Lloyd, Chicago, IL. John E. Burke, Attorney at Law, Chicago, IL. Phillip A. Wittmann, Stone, Pigman, Walther, Wittmann, et al, New Orleans, LA.

JUDGES:
Before TJOFLAT, HULL and KRAVITCH, Circuit Judges.

OPINIONBY:
TJOFLAT

OPINION:

TJOFLAT, Circuit Judge:

Over a period of months during the early 1990s, these consolidated cases were transferred to the United States District Court for the Middle District of Florida by the Judicial Panel on Multidistrict Litigation for pretrial proceedings pursuant to 28 U.S.C. § 1407. At the conclusion of those proceedings, the parties agreed that the cases would remain in the Middle District of Florida for trial. Some of the cases settled on the eve of trial; the remainder were tried to a verdict for the defendants. The plaintiffs appeal. The question now arises whether the Supreme Court's decision in Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998), requires that the judgment of the district court be vacated and appellants' lawsuits be returned to their original districts. Because appellants explicitly requested that the district court try their cases, we affirm.

I.

In 1992, numerous actions were brought in district courts around the country by users of bulk liquid carbon dioxide ("CO[2]"), claiming antitrust violations by defendants The BOC Group, Inc. ("BOC"), Liquid Air Corporation ("Liquid Air"), and Liquid Carbonic Corporation ("Liquid Carbonic"), all of whom are major producers of bulk liquid CO[2]. As the litigation progressed, a class of plaintiffs was certified.[1] Thereafter, a significant number of plaintiffs (the "Anheuser-Busch Plaintiffs") opted out of the class and filed a separate suit. Pursuant to its authority under 28 U.S.C. § 1407(a) (1994),[2] the Judicial Panel on Multidistrict Litigation ("JPML") transferred all of the cases from the various districts in which they were filed to the Middle District of

Florida (the "transferee court") for coordinated pretrial proceedings.

During the course of these proceedings, appellants opted out of the plaintiff class and filed separate actions against BOC, Liquid Air, and Liquid Carbonic. Specifically, B.C. Rogers Processors, Inc., B.C. Rogers Poultry, Inc., Choctaw Maid Farms, Inc., Forest Packing Company, Inc., and Marshall Durbin of Tupelo, Inc. ("the Mississippi Plaintiffs") filed suit in the United States District Court for the Southern District of Mississippi, and Mohawk Packing Company ("the California Plaintiff") filed suit in the United States District Court for the Northern District of California. Separate orders by the JPML transferred the Mississippi and California cases as "tag along" actions to the Middle District of Florida for coordinated pretrial proceedings.

The transferee court held a final pretrial conference on December 11, 1995, at which appellants were in attendance. The parties stipulated, and the Final Pretrial Order stated, that jurisdiction and venue were proper in the Middle District of Florida, and that the cases would be tried by the transferee court in Orlando on Monday, February 5, 1996.

On Friday, February 2, the court held an omnibus hearing at which it entertained scores of evidentiary motions in limine and otherwise readied the case for jury selection and trial. On Monday, February 5, after the parties had assembled in the courtroom for jury selection, the court was informed that during the preceding weekend the following settlements had been reached: the class plaintiffs had settled with Liquid Air and Liquid Carbonic (the class plaintiffs had settled with BOC approximately a year earlier); the Anheuser-Busch Plaintiffs had settled with Liquid Air and Liquid Carbonic; and the Anheuser-Busch Plaintiffs and BOC were still negotiating. If BOC and the Anheuser-Busch

Plaintiffs settled, only the Mississippi and California Plaintiffs would remain as plaintiffs in the case.

At this point on February 5, the court informed counsel that it was considering whether, in light of these settlements, to return the remaining cases to the districts in which they were filed. In response, BOC's counsel announced that it would not settle with the Anheuser-Busch Plaintiffs unless appellants' cases were tried in Orlando. Believing that BOC's position was reasonable and that the litigation could be most efficiently managed in Orlando, the court adhered to the Pretrial Order and stated that it would try the cases there.[3]

Upon hearing the court's announcement that the trial would be held in Orlando, the Mississippi Plaintiffs moved the court to issue a suggestion of remand to the JPML, or in the alternative, to transfer the case to the Southern District of Mississippi. They contended that the court had to choose one of these alternatives because it lacked subject matter jurisdiction to litigate the case to a conclusion, and because proper venue laid in the Southern District of Mississippi. The California Plaintiff joined in these motions, contending that the appropriate venue for its case was the Northern District of California. All motions were denied.

Appellants thereafter filed an emergency motion with the JPML to remand their cases to the districts in which they were filed pursuant to 28 U.S.C. § 1407(a) and Rule 14(b) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.[4] While that motion was pending, appellants petitioned this court for a writ of mandamus requiring the district court to file a suggestion of remand with the JPML. We stayed the trial pending resolution of the petition, which we denied. After we denied the writ, the district court rescheduled the trial for March 4, 1996. The JPML did not reach appellants' motion for remand until April 15, 1996, at which time it denied the motion as moot because the trial of

the case had already been held and judgment had been entered for the defendants on March 21.

The Mississippi and California Plaintiffs appealed, arguing in part that the district court denied them due process of law by refusing to return the cases to their original districts.[5] We affirmed without opinion, and the United States Supreme Court granted certiorari. The Court vacated our prior judgment and remanded the case for reconsideration in light of its recent decision in Lexecon, 523 U.S. 26, 118 S. Ct. 956, 140 L. Ed. 2d 62.

The precise issue to be addressed is whether Lexecon requires this court to vacate the district court's judgment and refer the cases to the JPML for remand to their original districts. We hold that Lexecon does not require such relief; we therefore adhere to our earlier disposition which affirmed the district court.

II.

A.

In Lexecon, the Ninth Circuit encountered a section 1407 issue similar to the one presented here. Lexecon was initially one of the defendants in a class action brought against Charles Keating and the American Continental Corporation in connection with the failure of Lincoln Savings and Loan. Lexecon, 523 U.S. at 29, 118 S. Ct. at 959. It and other actions arising out of that failure were transferred for pretrial proceedings to the District of Arizona under section 1407(a), which authorizes the JPML to transfer civil actions with common issues of fact "to any district for coordinated or consolidated pretrial proceedings," but provides that the JPML shall remand any such action to the original district "at or before the conclusion of such pretrial proceedings." Id. (quoting 28 U.S.C. § 1407(a)). Lexecon settled with the plaintiffs before the end of pretrial proceedings, and the claims against it were thereafter dismissed.

Lexecon subsequently brought a diversity action in the Northern District of Illinois against two law firms--Milberg and Cotchett--which served as counsel for the class action plaintiffs. Milberg and Cotchett moved for, and the JPML ordered, a section 1407(a) transfer to the District of Arizona where the remainder of the Lincoln Savings litigation was still ongoing. Once all plaintiffs other than Lexecon had settled, Lexecon moved the district court to refer the case back to the JPML for remand to the Northern District of Illinois. Milberg and Cotchett opposed the motion because discovery was still incomplete, and filed a countermotion requesting the court to "transfer" the case to itself for trial pursuant to 28 U.S.C. § 1404(a).[6] While deferring its ruling on the parties' respective motions, the court granted summary judgment in favor of the law firms on all claims except one brought in defamation against Milberg, and dismissed the law firms' counterclaims. The court then granted the countermotion (thereby assigning the case to itself for trial) and denied Lexecon's request that the case be referred back to the JPML for remand. See id. at 29-31, 118 S. Ct. at 959-60.

The surviving defamation claim went to trial in the District of Arizona, resulting in a judgment for Milberg. Lexecon appealed the transfer order to the Ninth Circuit,[7] which affirmed on the ground that "permitting the transferee court to assign a case to itself upon completion of its pretrial work was not only consistent with the statutory language but conducive to efficiency." Id. at 32, 118 S. Ct. at 960.

The Supreme Court granted certiorari and reversed, holding that a district court conducting pretrial proceedings pursuant to section 1407(a) has no authority to invoke section 1404(a) to assign a transferred case to itself for trial. See id. 523 U.S. at 40-41, 118 S. Ct. at 964. The decision invalidated the then-existing version of Rule 14(b) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, which provided that "each transferred action that has not been terminated in the transferee district court shall be remanded

by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406." Notwithstanding Rule 14(b), the Court found that the remand requirement in section 1407 (mandating that all transferred actions "shall" be remanded by the JPML) created "an obligation impervious to judicial discretion," id. at 35, 118 S. Ct. at 962, and therefore could not be read to accommodate a district court's self-assignment of the case under section 1404(a).

B.

Despite their pretrial stipulation that venue was proper in the Middle District of Florida, appellants request relief from judgment on the ground that the cases should have nevertheless been remanded to their original districts pursuant to section 1407. They rely on Lexecon to support their argument that section 1407 is self-executing, and thus rendered the transferee court powerless to retain control of the cases beyond the conclusion of pretrial proceedings regardless of appellants' acquiescence. The circumstances of this case, however, are clearly distinguishable from Lexecon.

Far from requesting that their cases be remanded to the districts in which they were filed, appellants' position throughout the proceedings in the transferee court was that the cases should be tried in Orlando. For example, in their response to a motion BOC filed in July 1995, in which BOC requested a severance so that the cases against it could be tried separately, appellants claimed that:

> if granted, BOC's motion would result in an egregious waste of judicial resources and in unnecessary expense to all parties, other than BOC.... If the court ordered separate trials of the class and individual claims, the trial will be twice as long and either the

> class or the other defendants would be prejudiced as a result.... Plaintiffs as a group intend to put on documentary and anecdotal evidence of the defendants [sic] involvement in a scheme to fix prices.... Multiple trials certainly will not be more convenient than a single trial would be.... Nor would the goals of expeditiousness or economy be served by separate trials. BOC's motion [for separate trials] should be denied.

Appellants were fighting to keep their cases in the Middle District of Florida, not to get them out.

Moreover, appellants stipulated at the final pretrial conference, and the court stated in the Final Pretrial Order, that the Middle District of Florida had subject matter jurisdiction over all claims, and that "venue [was] proper under 28 U.S.C. § 1391." To be sure, parties may not stipulate subject matter jurisdiction. See West Peninsular Title Co. v. Palm Beach Cty., 41 F.3d 1490, 1492 n. 4 (11th Cir.1995). Venue, however, is another matter. "The locality of the law suit--the place where judicial authority may be exercised--though defined by legislation relates to the convenience of litigants and as such is subject to their disposition." Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168, 60 S. Ct. 153, 154, 84 L. Ed. 167 (1939); see also Olberding v. Illinois Cent. R.R. Co., 346 U.S. 338, 340, 74 S. Ct. 83, 85, 98 L. Ed. 39 (1953) (noting that venue restriction "is not a qualification upon the power of the court to adjudicate, but a limitation designed for the convenience of litigants, and, as such, may be waived by them"). It is clear from the Court's opinion in Lexecon that section 1407 is not a jurisdictional limitation, but rather "a venue statute that ... categorically limits the authority of courts (and special panels) to override a plaintiff's choice [of forum]." Lexecon, 523 U.S. at 42, 118 S. Ct. at 965.

In their representations to the district court, appellants' choice of forum was the Middle District of Florida. Appellants freely admit that "so long as the various cases were scheduled for consolidated trial, they expressed no objection to a single trial in Orlando, Florida."[8] Furthermore, appellants contended that "the Middle District of Florida was a district in which these cases could have been brought."[9] Indeed, appellants' every action belies their assertion to the district court on the day of trial that "we, of course, have been contending from the get go ... that we want to be in Mississippi."[10]

If the Mississippi and California Plaintiffs believed that they had a right to have their cases remanded to their original districts, they should not have asked the court to try the case in Orlando. "Having induced the court to rely on a particular erroneous proposition of law or fact, a party in the normal case may not at a later stage of the case use the error to set aside the immediate consequences of the error." Charter Co. v. U.S., 971 F.2d 1576, 1582 (11th Cir.1992) (internal citation omitted).

In sum, appellants' actions throughout pretrial proceedings make this case clearly distinguishable from Lexecon. Lexecon requested remand early in the case, insisted that proper venue lay in the Northern District of Illinois (where the case had been filed), and "continuously objected to an uncorrected categorical violation of the [section 1407] mandate," Lexecon, 523 U.S. at 43, 118 S. Ct. at 966, when the district court refused to issue a suggestion of remand. Conversely, appellants in the instant case not only failed to raise the issue of remand until the day of jury selection, but actually stipulated that venue was proper in the Middle District of Florida and consistently urged the district court to try the case in Orlando. "It is a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party. " U.S. v. Ross, 131 F.3d 970, 988 (11th Cir.1997) (quoting Crockett

v. Uniroyal, Inc., 772 F.2d 1524, 1530 n. 4 (11th Cir.1985) (internal quotes omitted)). To the extent the district court may have erred in refusing to issue a suggestion of remand to the JPML, appellants invited any such error and may not be heard to complain of it on appeal.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

----------Footnotes----------

[1] On April 19, 1993, the plaintiff class was certified as:

> all individuals or entities (excluding all governmental entities and defendants and other carbon dioxide producers and their respective subsidiaries and affiliates) in the continental United States that purchased carbon dioxide directly from any defendant (including their respective subsidiaries or affiliates) at any time during the period of January 1, 1968 until October 22, 1992.

[2] 28 U.S.C. § 1407(a) (1994) provides in pertinent part:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.... Each action so transferred shall be remanded by the panel at or before the conclusion of such

> pretrial proceedings to the district from which it was transferred....

[3] The trial was rescheduled to begin on February 20, 1996.

[4] At the time this litigation was ongoing in the district court, Rule 14(b) of the Multidistrict Rules stated:

> Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406. In the event that the transferee judge so transfers an action under 28 U.S.C. § 1404(a) or 1406, no further action of the Panel shall be necessary to authorize further proceedings including trial. Actions that were originally filed in the transferee district require no action by the Panel to be reassigned to another judge in the transferee district at the conclusion of the coordinated or consolidated pretrial proceedings affecting those actions.

This rule was subsequently modified by the Supreme Court's decision in Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998), the effect of which is at issue in the instant appeal.

[5] Appellants contended alternatively that various trial court errors required the vacation of the district court's judgment and a new trial. We found no merit in appellants' contentions and affirmed the district court's rulings under

11th Cir. R. 36-1.n6 28 U.S.C. § 1404(a) (1994) states: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[6] 28 U.S.C. § 1404(a) (1994) states: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[7] Lexecon previously filed a petition for mandamus after the district court's ruling on its motion to refer the case to the JPML, which was denied by the Ninth Circuit because "the [section 1404(a)] transfer order [could] be appealed immediately along with other issues in the event the petitioners [lost] on the merits [at trial]." Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 1995 U.S. App. LEXIS 19193, No. 95-70380 (9th Cir. July 21, 1995).n8 Appellants' brief reveals why the Mississippi and California Plaintiffs waited until the day of trial to request a suggestion of remand to their original districts:

[8] Appellants' brief reveals why the Mississippi and California Plaintiffs waited until the day of trial to request a suggestion of remand to their original districts:

> At the time this case was set to go to trial, the attorneys for each of the several Plaintiff groups had agreed upon a division of labor for the trial. As is not unusual in cases of this type the bulk of the trial work, including direct examination of Plaintiffs' major witnesses and cross-examination of Defendants' major witnesses, was to be done by counsel for the class and the largest group of opt-out plaintiffs. So long as the various cases were scheduled for consolidated trial, the Plaintiffs/Appellants

> expressed no objection to a single trial in Orlando, Florida.

As noted, supra, the plaintiff class and the largest group of opt-out plaintiffs (the Anheuser-Busch Plaintiffs) had settled or were in the process of settling with all defendants on the day that appellants first moved the district court to refer the cases back to the JPML for remand.

[9] When trial in Orlando became less convenient, however, appellants tried to switch horses mid-stream, requesting remand and arguing to the district court that "this is ... a forum in which this case could not have been originally brought ...." (emphasis added).

[10] In the hearing the district court held on January 12, 1994, to set a trial date, counsel for defendant Liquid Air stated:

> I have heard, I believe both on and off the record, suggestion by one or more of the attorneys for Plaintiffs in this case, that they may wish to file a motion to remand these cases for trial back to the district in which the actions were originally filed after this court has ruled on the summary judgment motions. The question as to remand ... will be one which will require briefing and decision by this court. I am unclear at this time ... whether the decision to seek remand has been made by any individual plaintiffs.

We cannot find, nor has counsel called to our attention, any objection made on the record by Mississippi or California Plaintiffs to the trial of the cases in Orlando before the trial was to commence on February 5, 1995.

ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
FILED JANUARY 29, 1998

IN THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

No. 96-2704

D.C. Docket No. 92-MD940-CIV-ORL-3L23

IN RE:

CARBON DIOXIDE INDUSTRY ANTITRUST
LITIGATION, STATE OF FLORIDA, ex rel., et al.,

Plaintiffs.

FOSTER POULTRY FARMS and MOHAWK PACKING
COMPANY, B.C. ROGERS PROCESSORS, INC., et al.,
Plaintiffs-Appellants,

versus

LIQUID AIR CORP., et al.

Defendants-Appellees.

Appeals from the United States District Court
for the Middle District of Florida
(January 29, 1998)

Before TJOFLAT and HULL, Circuit Judges, and
KRAVITCH, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.1.[fn1]

"Costs taxed against plaintiffs-appellants.

Entered: January 29 1998
For the Court: Thomas K. Kahn, Clerk

By: s/ Man Davidson Deputy Clerk

ISSUED AS MANDATE: 2/27/98

fn1. 11th Cir. R. 36-1 provides:

When the court determines any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) he evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

ORDER OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION DENYING MOTION AS MOOT FILED APRIL 15, 1996

DOCKET NO. 940

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT

LITIGATION IN RE CARBON DIOXIDE INDUSTRY ANTITRUST LITIGATION

B.C. Rogers Processing, Inc., et al. v. BOG Group, Inc., et al., M.D. Florida, C.A. No. 6:93-965 (S.D. Mississippi, CA. No. 3:93-598)

BEFORE JOHN F. NANGLE, CHAIRMAN, ROBERT R. MERHIGE, JR., WILLIAM B ENRIGHT, CLARENCE A. BRIMMER, JOHN F. GRADY, BAREFOOT SANDERS AND LOUIS C. BECHTLE, JUDGES OF THE PANEL

ORDER DENYING MOTION AS MOOT

On February 15, 1995, plaintiffs in the above-captioned action (Rogers) moved the Panel, pursuant to 28 U.S.C. § 1407, for an order i) remanding Rogers from the Middle District of Florida to the Southern District of Mississippi, and ii) staying Rogers until thirty days after the Panel resolved the remand motion. Trial of Rogers commenced in the Middle District of Florida on March 5, 1996. On March 21, 1996, jury verdicts were returned in favor of the defendants and judgment was entered.

ACCORDINGLY, IT IS ORDERED that the motion for remand, pursuant to 28 U.S.C. §1407, be, and the same hereby is, DENIED as MOOT.

FOR THE PANEL:
s/ John F. Nangle
John F. Nangle Chairman

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION, FILED APRIL 30, 1996

M.D.L.

NO. 940

JUDGE PETER BEER

IN RE CARBON DIOXIDE

ANTITRUST LITIGATION

ORDER

Before the Court are the following motions filed by the Mississippi and California Plaintiffs:

1) Motion for Judgment as a Matter of Law, or in the Alternative for a New Trial,

2) Supplemental Motion for Judgment as a Matter of Law, or in the Alternative for a New Trial,

3) Motion to Alter or Amend Judgment, and

4) Motion for Review of Clerk's Taxation of Costs.

The Court, after considering the briefs of record makes the following rulings:

IT IS ORDERED that the Plaintiffs' Motion for Judgment as a Matter of Law or, in the Alternative for a New Trial is hereby DENIED.

The Plaintiffs' Supplemental Motion for Judgment as a Matter of Law or, in the Alternative for a New Trial is also DENIED.

The Motion to Alter or Amend Judgment is DENIED insofar as it seeks to amend the judgment by deleting that portion of the judgment which awards defendants their costs. The Court reserves ruling on the Motion for Review of Clerk's Taxation of Costs at this time.

New Orleans, Louisiana this 30th day of April, 1996.

s/ Peter Beer
Peter Beer
United States District Judge

ORDER DENYING PETITION FOR WRIT OF MANDAMUS OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED FEBRUARY 23, 1996

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-2179

IN RE:

B.C. ROGERS PROCESSORS, INC., B.C. ROGERS POULTRY, INC., McCARTY FARMS, INC., McCARTY FOODS, INC., MARSHALL DURBIN, INC., ET AL.,

Petitioners.

On Petition for Writ of Mandamus to the United States District Court for the Middle District of Florida

BEFORE: BLACK, CARNES and BARKETT, Circuit Judges.

BY THE COURT:

In this petition for writ of mandamus, petitioners ask us to direct the district court to remand this case to the Southern District of Mississippi and the Northern District of California pursuant to 28 U.S.C. § 1407 (a). We deny the petition for writ of mandamus. "Mandamus . . . is an extraordinary remedy reserved for extraordinary situations . . . [,]" U.S. v. Coy, 19 F.3d 629 (11th Cir. 1994), and mandamus is not the appropriate remedy here. The district court's denial of petitioners' request for a remand can be appealed immediately after the trial along with any other appealable issues in the event petitioners do not prevail on

the merits. The stay previously entered shall remain in effect until 10 days after the date of this order.

Accordingly, the petition for writ of mandamus is DENIED.

ORDER OF THE UNITED STATES SUPREME COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION, ON MOTION FOR SUGGESTION OF REMAND DATED FEBRUARY 6, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

92-MD-940-CIV-ORL-3L23

HONORABLE PETER HILL BEER

IN RE CARBON DIOXIDE

ANTITRUST LITIGATION

THIS DOCUMENT RELATES

TO ALL ACTIONS

ORDER ON MOTION FOR SUGGESTION OF REMAND, OR, IN THE ALTERNATIVE, FOR TRANSFER

This matter came on for hearing on February 6, 1996, on the Mississippi Individual Plaintiffs' Motion for Suggestion of Remand, or, In the Alternative, Transfer to the Southern District of Mississippi, which was joined in and adopted by the California plaintiffs to the extent they seek transfer to the Northern District of California, and the Court, having heard argument of counsel and being fully advised in the premises, finds that said Motion should be DENIED. It is, therefore,

ORDERED AND ADJUDGED that said Motion is DENIED.

DONE AND ORDERED this 6th day of February, 1996.

s/ Peter Beer
DISTRICT JUDGE PETER HILL BEER

EXCERPTS OF HEARING BEFORE THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, DATED FEBRUARY 6, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MULTI DISTRICT LITIGATION #940

IN RE: CARBON DIOXIDE INDUSTRY ANTITRUST T LITIGATION

ORLANDO, FLORIDA
FEBRUARY 6, 1996

EXCERPTS OF HEARING

BEFORE THE HONORABLE PETER J. BEER
UNITED STATES DISTRICT COURT JUDGE

* * *

[9] * * *

THE COURT; Wait a minute. I had said if [10] you decided to file a writ it should be done by the end of business today.

MR. ALLRED: Yes, your honor.

THE COURT: I certainly have not ordered anybody the file anything.

MR. ALLRED: To use better language, your honor, you gave use permission to file a writ and said if we were to it, do it by the end of today, and so

THE COURT: Yes.

MR. ALLRED: It was our judgment we needed a definitive ruling from your honor on these several motions and we would like to have a transcript of this proceeding to send forward as soon as practicable.

We do have a draft of the writ, but it is based upon the facts and rulings of the court here, which is essentially the effect of what was done yesterday, but not on the record.

THE COURT: Well, I don't object to that at all. I think that that may be a more orderly way to address it and that's okay with me.

So, why don't you all, as the moving parties with respect to your motions, just go ahead and make your motions, substantiate them in what [11] ever way you feel is consistent

[12]* * *

I would like to say to the court that we have several matters before the court for the record.

We have a motion for suggestion of remand, or in the alternative, transfer to the Southern District of Mississippi and a very short memorandum on that.

We have an objection to jurisdiction and venue in this case.

* * *

We have a motion to reconsider the court's so-called commitment and ruling on the writ transfer of the Mississippi

plaintiffs to the cases to the Southern District of Mississippi.

[13] * * *

Secondly, or lastly, your honor, we would move the court if this is not cumulative to our other motions for transfer of this case pursuant to Twenty Eight U.S.C. Fourteen Zero Four A, to the Southern District of Mississippi.

[20]* * *

Now if the court please, the other sector of this matter is what transpired yesterday.

We, of course, have been contending from the get go, and we continued to contend yesterday, and we continue to contend today, that we want to be in Mississippi.

I recall, your honor, the first thing that happened as I was standing here, and your honor was [21] speaking to Mr. Wittmann and others, and I believe your honor had inquired of someone, whether the settlement that was in prospect with Mr. Freeman, and the remaining defendant would dispose of the whole case, and Mr. Wittmann said something about well, it would except for the Allred Group and California. Your honor said that won't be a problem, I will send them back to Mississippi.

Later that morning the deputy came into the courtroom and informed us that your honor would definitely do that rather than making it preliminary indication.

* * *

Later the deputy came out and said that is now definite, the court sent me out here to tell you all that rulings

about going to Mississippi are going to be held firms

Now, from what we learned after going into [22] chambers when we asked your honor later the defendants came in and apparently confected a settlement between Mr. Freeman and his plaintiffs, and one of the defendants, or all of them, I don't know who was cooperating in it at this moment, and they asked your honor to approve a settlement between Freeman that was acceptable to Freeman, and therefore advantage to Freeman, and therefore in his clients best interest, based upon a commitment that you would reverse your ruling that you had announced in this court upon which we relied.

THE COURT: I think you have given a little bit more of a formal stamp then is really the case, but there's isn't any doubt the correctness of your statement that I had indeed said essentially what you have quoted, which is that I would manage that aspect of the matter in the basically the way that you have just described, so the only thing that I think the court ought to know and the record ought to know is that this never was formalized in anyway.

On the other hand, I did feel an obligation to ask the courtroom deputy to pass that word back to you pretty much the way you have just described it.

[23] Now, I am not a devious persons, that was not with any malice of forethought or calculation or waiver, it was an effort to keep everybody current with where I was thinking in terms of the overall management of what I guess is the most complicated set of settlements that I have run into in the time I have been around, so your definition of what transpired is entirely accurate.

The only thing that isn't perhaps totally accurate, as far as I am concerned, is the formal significance that you give

it when there wasn't any formal significance. It was simply an effort on my part, through A, the most helpful person that I have had working with me in this matter, that the clerk of court, to keep you all posted about what was going on in terms of my management of it, didn't even occur to me that it had any affect in terms of other factors, but simply that you all should know what I was thinking.

When the matter was brought to my attention in terms of the conditional acceptance of the settlement, my feeling was well, okay, you haven't been able to bring much to the actual negotiations because they are really over your head, I am saying to myself, but this is something that [24] perhaps you can do to move the matter to a conclusion as far as this situation is concerned.

To tell you the truth, I wasn't even thinking in terms of what was later, the impact that you all feel was visited upon you, and I can understand that.

As I told you yesterday, given the whole scenario, I would do the same thing again, but I understand your frustration a good deal better then I did when I first was trying to move us along towards a resolution of the whole case.

So, there's no fault finding with respect to you accuracy in reporting the event.

The only thing I think is perhaps necessary to clarify is that I didn't perceive it then nor now to be some sort of formal ruling. It was a signal to you all where I though I was going to be heading with this.

* * *

[25]* * *

The facts, though, are that while your honor was in the frame of mind and as innocent of ill motive, as you have said, I don't believe that same can be said of the defendants who entered into this.

If the court please, they knew all there was to know about the case and about the posture of this settlement, while your honor has indicated that you did not.

In that posture, if the court please, they came into that room and traded Mr. Freeman a lay down on this, on our going back to Mississippi, which they have been actually told was of tremendous benefit to us and we valued it.

* * *

[26]* * *

...Also, if the court please, that it was a deal in this posture, there were two parties before your honor asking for a settlement, the Freeman opt-out plaintiffs and one of the defendants.

The defendants said we will pay the money, which Freeman contends is in his favor, beneficial to him, if you, your honor, will take something away that you have preliminarily indicated under the circumstances that you have described to the [27] Mississippi plaintiffs.

THE COURT: No, that was not the context. And it's important for you to know the context.

The defense counsel never even went into taking something away.

The whole discussion was predicated on an

observation which I found to be perfectly acceptable, that a great amount of money was being paid in the settlement, a huge amount of money had been expended in connection with the litigation process, and the one thing that the defendant required in terms of the management of the matter at that point in time was that it be that it all be resolved.

There wasn't any there wasn't even a discussion about venue or anything else, it was simply that it all be resolved, i.e., that this be the forum, that this be the place of resolution of the balance of the cases That was the entirety of their contentions to me.

And I thought that that was okay under the circumstances. My feeling was well, if I can bring that to the process, okay, I will do it.

It did occur to me that even at that moment in time, and I discussed it even then with [28] the clerk of court, it would probably require some delay.

* * *

THE COURT: I never even at the sort of high water mark of my improprieties, if indeed they were that, had the notion that you would be thrust into trial at one thirty yesterday afternoons

It was then and still is my feeling, as clerk, and I discussed this morning, the obvious [29] necessity for some time to be available to you.

MR. ALLRED: Thank you. The point being in making that requirement of the settlement the defendants did ask you honor for somewhat of a commitment, I believe that was words your honor used, we would be put to trial here which was contrary to the preliminary indication you asked

the clerk to announce to us earlier.

THE COURT: Actually it was not I didn't think the emphasis was as much quote here unquote, as it was resolved in these proceedings; that they simply could not willingly participate in a whole new set of lawsuits.

* * *

[37]* * *

THE COURT: Well, you know, I have to confess my ignorance about the process in terms of what I need to sign off on.

Is there anything that you need from me before it goes?

MR. ALLRED: I need orders on all these motions, and I need your honor's indulgence, at least to let me see if I could talk the reporter into giving a daily transcript of this hearing.

THE COURT: Well, again that's something I have to leave up to you and him. But okay, well, I will just kind of consistent with your request, I [38] will just say you got to get it all done before the close of business tomorrow.

* * *

[39]* * *

MR. SEIGEL: Judge, for the record, Mel [40] Segal on behalf of the California Plaintiffs.

And basically I adopt Mr. Allred's presentation in this matter.

Of course, as your honor can see, we have already joined all their motions with the exception of the one motion regarding Mr. Freeman's settlement.

* * *

[58]* * *

Now, as far as the writ, the application to multi district panel, etc., that's really something that I don't think I have much control over or say about.

Certainly this record now contains every bit of information that either the Circuit Court of Appeal or the panel on multi-district litigation would want from me, because the exchange that in Mr. Allured and I have had essentially describes that, and I don't think it needs to be further enlarged upon.

I will say one other thing about the let me see if that takes care of the actual existent motions.

MR. ALLRED: For the record, may I ask the court for a specific ruling on these motions, since they will go up.

THE COURT: Yes. I will grant the motion for a continuance and reset the case for trial in this court at nine a.m. on Tuesday, February 20.

I will, at this time, deny the plaintiff's objection to jurisdiction and venue, for the reasons already stated.

I will deny the motion to set aside the [59] preliminary settlement agreement.

I will deny the motion for remand, or in the

alternative, transfer to the Southern District of Mississippi.

And the same with respect to the - what is the Middle District of Northern District of California.

MR. SEIGEL: Northern District of California.

THE COURT: I think that covers it. Anything else?

MR. ALLRED: There was one more. It was the motion to reconsider court's commitment and ruling on the retransfer.

THE COURT: To the extent that it is necessary, the court will deny that motion simply to complete the record, for the reasons that have already been stated.

* * *

MOTION FOR JUDGEMENT OF THE
UNITED STATES DISTRICT COURT FOR THE MIDDLE
DISTRICT OF FLORIDA, ORLANDO DIVISION
FILED APRIL 4, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

92-MDL-940

HONORABLE PETER HILL BEER

IN RE CARBON DIOXIDE ANTITRUST LITIGATION
THIS DOCUMENT RELATES TO ALL ACTIONS

MOTION FOR JUDGMENT AS A MATTER OF LAW,
OR IN THE ALTERNATIVE FOR A NEW TRIAL

The Mississippi and California Plaintiffs move the Court, pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, for judgment as a matter of law, or in the alternative, for a new trial. As grounds for this motion, Plaintiffs would show:

1. . The Court was without authority to hear this case, in that:

a. No order was ever entered transferring this case to the Middle District of Florida for any purpose other than pre-trial proceedings.

b. No motion to transfer the action to the Middle District of Florida for all purposes was ever filed, nor was any consideration given to the propriety of such a

transfer.

c. For the reasons stated in Plaintiffs' various motions objecting to jurisdiction and venue.

2. The Court erred in denying Plaintiffs' Motion for Suggestion of Remand or for Transfer, in the following respects:

a. The Court has acknowledged facts which establish that there was an improper *ex parte* communication between counsel for BOC and the Court, which resulted in the Court's making a "commitment" to resolve the transfer or remand issue in favor of Defendants and keep the cases in Florida;

b. The Court summarily denied Plaintiffs' motion to remand or transfer, without giving any consideration to the appropriate factors; and

c. For the reasons stated in Plaintiffs' Motion.

3. The Court erred in denying Plaintiffs' Motion for Recusal by failing to give any consideration to the appearance of partiality which followed from the Court's meeting with counsel for BOC ex parte and committing to keep the cases in Florida for trial. The Court's comments in ruling on the Motion for Recusal make it clear that the Court focused on whether he actually felt any bias or partiality, to the exclusion of any consideration of whether the appearance of partiality was present. Plaintiffs incorporate the grounds stated in Plaintiffs' Motion.

4. The Court erred in denying Plaintiffs' Motion for a Continuance, in that:

a. The Court pushed Plaintiffs to trial without allowing the Judicial Panel On Multidistrict Litigation

to rule in Plaintiffs' pending motion for remand;

b. Plaintiffs were denied adequate time to obtain and schedule the presence of witnesses;

c. Plaintiffs were denied adequate time to make the adjustment from being prepared to present the testimony of only three witnesses to being prepared to put on proof of a nationwide conspiracy that spanned 25 years; and

d. For the reasons stated in Plaintiffs' Motion.

5. The Court erred in its instructions to the jury, in the following respects:

a. The Court refused to give requested pretrial instructions, leaving the jury with no guidance from the Court on what to look for in the evidence;

b. The Court's instructions to the jury at the close of the case were erroneous, misleading and unfairly stacked in favor of the Defendants, in that the instructions:

(i) Did not instruct the jury on the meaning of the terms "agreement," "price-fixing" or "customer allocation, all of which have special meaning under the antitrust laws, leaving the jury to resolve the case based upon a layman's understanding of the meaning of those terms;

(ii) The Court's failure to define the terms "agreement" and "price-fixing" was exacerbated by the Court's statements to the venire during *voir dire,* to wit: that the plaintiffs contended that "the Defendants in

the came have gotten together to set prices of liquid carbon dioxide;" and that the plaintiffs had the burden of proving that the defendants entered into an "arrangement to fix the price, and keep it fixed among themselves with respect to this product;" and that these statements told the jury that Plaintiffs had to prove that the prices were fixed in the sense that they were set at a certain level by agreement and kept there by agreement, which is neither an accurate statement of the law nor an accurate statement of the contentions of Plaintiffs; and

(iii) The erroneous impression created by the Court's comments preceding *voir dire* could have been eliminated by the Court's giving Instructions P-1 and P-2;

c. Told the jury that certain actions proven to have been taken by the defendants were not illegal, without also instructing the jury that while those actions were not in themselves illegal, they could be taken by the jury as circumstantial evidence that Defendants had entered into an illegal agreement;

d. Improperly instructed the jury as to the burden of proof in that the jurors were told that each Plaintiff had to prove every element of its case against each Defendant, and the possibility of confusion from this instruction was greatly enhanced by the Court's Special Interrogatories, which asked the jury to determine whether McCarty had proven that Airco engaged in a conspiracy to fix prices and/or allocate customers, while the jurors could very well have believed that they could find for the plaintiffs only

if they felt that the evidence adduced by a single plaintiff was sufficient to prove a particular defendant's participation in a conspiracy.

6. The Court erred in submitting the case to the jury on the special interrogatories proposed by Defendants, and in refusing to submit the case on the special interrogatories prepared by Plaintiffs, in that:

a. The interrogatory used by the Court was unduly complicated and misleading, in that it required the jury to find that each individual Plaintiff had proven each element of its case against each individual Defendant; and

b. The interrogatory proposed by Plaintiffs would have asked the jury simply whether the existence of a conspiracy had been proven; whether each Defendant had been shown to have participated in that conspiracy; and whether each Plaintiff had shown injury caused by the operation of the conspiracy.

7. The Court denied Plaintiffs their rights under the Due Process Clause, to fully contest the issues and abused its discretion by:

a. Arbitrarily limiting Plaintiffs to five days to put on their case, which resulted in Plaintiffs' being required to cut some witnesses entirely, resulting in the lose of their testimony and a limitation of Plaintiffs' ability to get documents into evidence, while absent such a time limitation, Plaintiffs could have called all of the witnesses for whom witness statements were filed by Plaintiffs, which statements are of record, and who were also listed in the Pretrial Order, which is of record;

b. Refusing to modify the time limitation ruling when it became apparent that Plaintiffs had not been able to put on a complete case, despite Plaintiffs' exercise of all due diligence to meet the Courts' arbitrarily imposed deadline;

c. Refusing to allow Plaintiffs to present testimony in keeping with the various proffers made, as shown in Exhibit A;

d. Ruling that Plaintiffs' witnesses could not testify to anything other than what the Court considered to be facts;

e. Applying the rules of evidence strictly against Plaintiffs, but very leniently as to Defendants:

(i) Prior to trial, in response to Defendants Motion in Limine regarding the testimony of Dr. Charles Dennis, the Court ruled that Dr. Dennis would not be allowed to testify based on what he had read in documents produced by Defendants unless every document he purported to rely upon was already in evidence;

(ii) During trial, the Court allowed Defendants to put on the testimony of Kent Masters regarding accounts lost to or gained from the other defendants, even though his testimony was based on a review of documents which were not in evidence, and which were not designated as exhibits in the pretrial order; while in fact, many of the documents on which he relied were the business records of companies other than his employer, including such companies as Coca-

Cola Enterprises and Anheuser Busch;

(iii) During trial, the Court also allowed Carol Gorski to testify for Defendant Liquid Air Corporation that Liquid Air had lost certain accounts to other Defendants and taken other accounts from other Defendants, when it was clear that her testimony was based on a review of documents not in evidence, rather than on her own personal knowledge;

(iv) The Court repeatedly, and often without any objection from Defendants, cut off any answer from Plaintiffs' witnesses which involved any sort or mental impression, interpretation or explanation, and refused to allow Plaintiffs to cross-examine Defendants' witnesses as to the meaning of evidence or events;

(v) The Court applied a strict and very narrow interpretation of Plaintiffs' witness statements and a very broad and liberal interpretation of Defendants' witness statements in determining whether testimony offered at trial should be excluded on the ground that it was not covered in the witness statements;

(vi) The Court cut off the testimony of Plaintiffs' witnesses and directed them that they could not give information about policies, procedures, etc. followed by the Defendants, unless they could give specific instances, with dates, and all of the particular; but allowed Defendants witnesses to testify to pure hearsay, so long as they first testified that they had personal knowledge of what they were

about to say, even though their testimony clearly showed that they did not know the legal meaning of the term personal knowledge and the information they were conveying was clearly hearsay;

(vii) The Court applied an overly broad view of what constituted leading questions to Plaintiffs' direct examinations, but allowed Defendants almost free rein to lead their witnesses;

(viii) The Court went beyond what in required by the Rules of Evidence in restricting Plaintiffs' redirect examination; and

(ix) Examples of the types of rulings listed above are contained in Exhibit B.

8. The Court erred in regard to rulings on the admissibility of documentary evidence, as follows:

a. The Court refused to admit business records produced by Defendants unless there was a witness on the stand who admitted familiarity with the document, even though there was no objection to the authenticity of the document and the documents contained admissions of a party opponent and were, therefore, not hearsay;

b. The Court ruled that Plaintiffs could not introduce any documents through Defendants' witnesses on cross-examination, when the Court was of the opinion that the evidence was something that should have been introduced in Plaintiffs' case in chief, even though the Court was well aware that Plaintiffs had been subject to an arbitrary time limitation in

presenting their case in chief;

c. The Court allowed Defendants' witnesses to repeatedly deny any knowledge of any conspiracy to fix prices or allocate customers, and to repeatedly deny that any allocation of customers was discussed at the Compressed Gas Association meetings, but would not allow Plaintiffs to question those witnesses about, or otherwise introduce any evidence concerning, the fact that Canadian subsidiaries of these same companies had pleaded guilty to conspiring to fix prices and allocate customers, and had admitted that the conspiracy was set up during CGA meetings in the United States;

d. The Court allowed Defendants to make repeated references to competition that occurred in 1992, but refused to allow Plaintiffs to introduce evidence regarding the Canadian guilty pleas and the filing of the class action complaint which the jury could well have believed explained all of the competitive acts which occurred in 1992;

e. The Court allowed Defendants to cross-examine Plaintiffs' witnesses concerning their not having brought the allegations of conspiracy to anyone's attention earlier, and to argue that point to the jury in closing, without allowing testimony concerning the witnesses having been granted immunity from prosecution;

f. The Court erred in admitting over Plaintiffs' objections the following exhibits: D-7; D-241; D-242; D243; D-244; D-245; D-651; D-905; D-906; D-908 & D-909 and 30a

g. The Court erred in refusing to admit the following

Plaintiffs' exhibits; P-6; P-7; P-8; P-9; P-12; P-13; P15; P-17; P-18; P-22; P-24; P-27; P-29; P-30; P-31; P-32; P-33; P-34; P-35; P-39; P-45 through P-54; P-66; P-74; P-75; P-111; P-149; P-151 through P-163 P-166; P-175; P176; P-189; P-192; P-194; P-198 through P-201; P-210 through P-231; P-265 through P-274; P-301 through P-308; P-381; P-383; P-384; P-391; P-394; P-395; P-397

9. The Court's constant comments on the testimony and documentary evidence during the trial, as well as hostile and derogatory remarks directed at Plaintiffs' ' counsel poisoned the jury against Plaintiffs and denied Plaintiffs a fair trial, and examples of such conduct by the Court are attached as cumulative Exhibit C to this motion, an follows:

a. Although the Court was aware that Plaintiffs had alleged and were attempting to prove the existence of a nation-wide conspiracy entered into by the only three companies engaged in marketing C02 on a nation-wide basis, and the Court wan, therefore, required to allow evidence of actions taken by the Defendants which tended to prove the existence of a conspiracy, regardless of where those actions occurred, the Court repeatedly interrupted Plaintiffs' presentation of evidence to state in the presence of the jury that evidence of what went on in areas outside Mississippi and California was not relevant and that the jury did not want to hear any of the details of those incidents;

b. The Court went far beyond what was required to rule on an objection and control the flow of evidence and made repeated comments that appeared to be intended to denigrate Plaintiffs' counsel and Plaintiffs' case before the jury;

c. The Court repeatedly and gratuitously offered its opinion that Plaintiffs had not proven anything with regard to the existence of a conspiracy;

d. The Court repeatedly, in the presence of the jury, criticized the order in which Plaintiffs' counsel presented evidence, even though the Court was well aware that he had forced Plaintiffs to trial without adequate time to line up witnesses, and even though the Court had denied a motion for continuance which was based upon the precise ground that the witnesses who knew the most about the conspiracy would not be available to testify until near the end of Plaintiffs' case if no continuance were granted;

e. The Court's comments in making rulings unnecessarily wasted much of the precious little time the Court had arbitrarily allotted Plaintiffs to put on their case; and

f. There were many other instances of abuse of the judicial prerogative to comment and guide the course of trial which are not specifically catalogued in the foregoing list.

10. The Court's obvious bias against Plaintiffs and Plaintiffs' counsel during the course of the trial affected the Court's evidentiary rulings and must have had an impact on the jury's view of Plaintiffs, Plaintiffs counsel and their case.

11. The Court erred in granting Defendants' motions in limine as to expert testimony regarding competition in the C02 marketplace in Mississippi; any reference to the Canadian guilty pleas, consent decree, assertion of the Fifth Amendment privilege against self-incrimination by defense witnesses during discovery, and the immunity from prosecution granted to Plaintiffs' witnesses.

12. Court abused its discretion in refusing to allow Plaintiffs to use summary charts in closing argument.

13. The Court's denial of a continuance, granting of Defendants' motions in limine, rulings on admissibility of evidence, unwarranted and abusive comments concerning Plaintiffs' counsel and their case, unwarranted and biased comments about the evidence, instructions to the jury, and jury interrogatory, all as discussed above, combined to deny Plaintiffs the right to a fair trial.

14. The Court erred in limiting the direct examination of Plaintiffs' witnesses on the alleged basis of the leading nature of questions and/or questions without a predicate to show competence and relevance.

15. The Court erred in allowing the Defendants, in a directly contradictory and discriminatory way, to elicit direct testimony by leading questions, without any predicate. In effect, the rules were applied in a strict and illiberal way to the Plaintiffs to preclude Plaintiffs' evidence improperly and were not applied to the Defendants at all or were applied in a liberal and permissive way. This tainted the evidence and the jury.

16. The Court erred in making hostile, angry, unjustified and unfounded comments upon the evidence, the witnesses, the testimony of the witnesses, counsel, the conduct of counsel and related matters so as to severely prejudice Plaintiffs, Plaintiffs' witnesses and Plaintiffs' counsel before the jury.

17. The Court erred in excluding the testimony of Plaintiffs' witnesses McNamee, Welsh, and other Plaintiffs' witnesses about the habits, customs, practices, "ground rules", "gentlemen's agreements", and other prior customs,

acts and practices of the Defendants, all of which were admissible.

18. The Court erred in refusing to admit into evidence Defendants business records which were stipulated to be authentic and which contained relevant evidence, much of which was relevant as admissions against interest.

19. The Court erred in refusing to allow Plaintiffs to adduce relevant evidence on Defendants' case in chief and/or during cross-examination.

20. The Court erred in refusing to allow Plaintiffs to offer evidentiary documents on Defendants' case in chief and/or during cross-examination.

21. The Court erred in refusing all of Plaintiffs' requested jury instructions or requests to charge the jury.

22. The Court erred in its charge to the jury in that the Court gave jury instructions which were abstract and failed to furnish any guide to the jury.

23. The verdict of the jury and the judgment of the Court predicated thereon are against the overwhelming weight of the evidence.

24. There is no evidence, or insufficient evidence to amount to substantial evidence, to support the verdict of the jury and the judgment predicated thereon.

25. The findings of the jury in response to the special interrogatories to the jury are against the overwhelming weight of the evidence.

26. According to the uncontradicted evidence by which the Defendants are bound, the Plaintiffs are entitled to

a verdict and judgment as a matter of law.

27. Plaintiffs assign the error of the Court in failure to grant the Plaintiffs' requests for a directed verdict or peremptory instruction. Plaintiffs hereby renew such requested peremptory Instruction.

28. Plaintiffs assign as error the findings and verdict of the jury in that there is no evidence, or insufficient evidence, to support a verdict for Defendants.

29. The verdict of the jury, and the Judgment of the Court predicated thereupon, are not supported by evidence or substantial evidence.

30. The verdict of the jury, and the judgment predicated thereon, are against the overwhelming weight of the credible evidence.

31. Plaintiffs assign as error that the jury erred as a matter of law in failing to find that the Defendants acted in concert or conspiracy and that such conspiracy proximately contributed to the cause of Plaintiffs' damages. The jury's finding and verdict, and the judgment predicated thereon, are not supported by the evidence or the substantial evidence. The Plaintiffs assign as error that the jury erred as a matter of law in its answer to special interrogatories that Defendants did not form a concert or conspiracy as against the Plaintiffs.

32. The uncontradicted evidence establishes that Defendants committed a conspiracy to fix prices and/or allocate customers as against the Plaintiffs.

33. Plaintiffs renew all of the several objections of the Plaintiffs made during the Defendants' case in chief and during the Plaintiffs' case in chief to evidence adduced by the Defendants and assign the error of the Court in overruling

and denying all of said objections.

34. Plaintiffs assign as error the several objections of the Defendants sustained by the Court and the error of the Court in excluding evidence offered by the Plaintiffs on the Plaintiffs' case-in-chief and on the Defendants' case-in-chief upon objection of the Defendants.

35. Whether enumerated herein or not Plaintiffs assign the error of the Court in overruling and denying the several objections and motions of the Plaintiffs filed in advance of trial after the collusive settlement between BOC Group and the Freeman "opt-out" Plaintiffs was announced.

Respectfully submitted this 4th day April, 1996.

By: s/ Michael S. Allred
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ATTORNEYS FOR PLAINTIFFS IN THE B.C. ROGERS CASE

LETTER FROM KENNETH A. RUTHERFORD TO OFFICE OF THE CLERK RE: B.C. RO GERS PROCESSORS, ET AL. V BOC GRO UP, ET AL., APPEAL DOCKET NO. 96-2704

ALSTON • RUTHERFORD
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December 31, 1997

Office of the Clerk
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: *B. C. Rogers Processors. et al. v. BOC Group, et. al.*,
Appeal Docket No. 96-2704

Dear Sir or Madam:

This case has been set for oral argument on January 15, 1998. In November 1997 the United States Supreme Court heard oral argument in a case styled *In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation; Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 102 F.3d 1524 (9th Cir. 1996), *cert. granted*, U.S. 1

17 S.Ct. 1818, 137 L.ed. 2d 1026 (1997).

One of the issues addressed by this case is whether or not a transferee judge for pretrial purposes in multidistrict litigation has jurisdiction to transfer the case to himself for trial. A decision that the transferee court lacked jurisdiction to try the case would be controlling in this case.

Another issue in the case is whether the appellant in that case waived its right to request a remand for trial because it did not file a motion for remand with the Multidistrict Panel. The Appellants in this case did file a Motion for Remand with the Multidistrict Panel. (Dkt. #1000). This Motion was not ruled upon by the Panel until after the trial was concluded, when it was denied as moot by the Panel.

Sincerely yours,

S/ Kenneth A. Rutherford

Kenneth A. Rutherford

Office of the Clerk
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303
December 31, 1997

KAR/slj
cc: William G. Schopf, Jr., Esq.
John E. Burke, Esq.
Michael J. Abernathy, Esq.
Melvyn L. Segal, Esq.

January 28, 1999

Thomas K. Kahn
Clerk of Court
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: 96-2704 - In Re Carbon Dioxide Industry Antitrust Litigation DC Dkt. No. 92-00940 MD-CIV-ORL

Dear Sirs:

The Court has directed that the parties submit letter memoranda, explaining how the decision of the United States Supreme Court in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998) impacts the decision which was rendered by this Court.

This response to that directive is submitted on behalf of all Plaintiffs on this appeal.

Plaintiffs submit that the *Lexecon* decision mandates reversal in these cases, followed by a remand to the Middle District of Florida, with instruction that the district court recommend to the Judicial Panel on Multidistrict Litigation that the cases are ready for remand to the districts from which they were transferred.

Procedural Background

There are two distinct cases before the Court at this juncture–one filed by B. C. Rogers Processors, Inc., B. C.

Rogers Poultry, Inc., Choctaw Maid Farms, Inc., Forest Packing Company, Inc., Marshall Durbin, Inc., Marshall Durbin Food Corporation, Marshall Durbin Poultry, Inc., Marshall Durbin of Tupelo, Inc. ("the Mississippi Plaintiffs") in the United States District Court for the Southern District of Mississippi, and one filed by Mohawk Packing Company ("the California Plaintiff") in the United States District Court for the Northern District of California.[1] By separate orders, these cases were transferred from the districts in which they were filed to the Middle District of Florida by the Judicial Panel on Multidistrict Litigation ("JPML") for coordinated pretrial proceedings.

Although no order transferring the cases to the Middle District of Florida for all purposes was ever entered, the transferee judge ordered the cases to trial in the Middle District of Florida. After the defendants settled with several other plaintiffs, and before the cases were called for trial, the Mississippi and California Plaintiffs moved the court to forward to the JPML a suggestion of remand, as contemplated by Rule 14(d) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. The trial court denied this motion without either written or oral opinion.

Plaintiffs then filed a Petition for Writ of Mandamus in this Court, and a motion to remand before the JPML. This Court denied the Petition for Writ of Mandamus, stating that the issue could be raised on direct appeal, if necessary. Following trial, and after judgment had been entered against the plaintiffs, the JPML denied the motion to remand, stating

---

[1] McCarty Farms, McCarty Foods, and Foster Poultry were also parties to the original appeal. They were not parties to the cert petition because the McCarty companies reached a settlement with Defendants and Foster filed its action in the Middle District of Florida.

that the issue was moot.

In a motion for new trial Plaintiffs again raised the issue whether the district court had authority to try these cases. The district court again denied the motion, without opinion. Plaintiffs then raised the issue on direct appeal before this Court. The decision of the district court was affirmed, without opinion. Plaintiffs then filed a Petition for Writ of Certiorari. The Supreme Court granted the petition, vacated the decisions of the lower courts, and remanded to this Court for reconsideration in light of the *Lexecon* decision.

Lexecon Requires Reversal

Section 1407(a) of Title 28 of the United States Code authorizes the JPML to transfer certain actions to a single district court "for coordinated or consolidated pretrial proceedings." That section further provides that "Each action so transferred *shall* be remanded by the panel at or before the conclusion of such pretrial proceedings ... ." (Emphasis added). The central issue before this Court is whether the district court had jurisdiction to try these cases. The plain answer is that it did not. The Supreme Court clearly so held in *Lexecon*.

At each stage of this litigation when the Plaintiffs' have asserted that the district court had no authority to do anything other than suggest remand, the only argument raised by the Defendants has been that Plaintiffs' waived the right to contest venue in the Middle District of Florida. This argument clearly misconstrues the issue. The issue is not now, and never has been, about whether venue was proper in the Florida court. There is no question but that the United States District Court for the Middle District of Florida was a proper venue, in the sense that it was a district in which these actions could have been brought pursuant to 28 U.S.C. §

1391 and 15 U.S.C. § 22. However, Plaintiffs did not bring their actions in that district. These actions were filed in the United States District Courts for the Northern District of California and the Southern District of Mississippi and were transferred to the Middle District of Florida pursuant to 28 U.S.C. § 1407(a) for pretrial proceedings. The issue is whether the transferee court had the power, in light of § 1407's placing venue for trial purposes in the districts in which the cases were filed, to change the venue.

In *Lexecon*, the Court repeatedly stated that what it was addressing was the power or authority of the transferee court to transfer the case to itself for trial. *Lexecon*, 118 S.Ct. 959 (on issue whether a transferee court may invoke § 1404 to assign a case to itself for trial, Court held "it has no such authority"); at 964 ("legislative history tends to confirm that self-assignment is beyond the scope of the transferee court's authority"); also at 964 (straightforward command to remand "bars recognizing any self-assignment power in a transferee court"). It should be noted that the Supreme Court was not called upon to determine whether the issue before it was one of jurisdiction or venue. The Court pointed out that "Lexecon took no exception to the Arizona court's jurisdiction (as distinct from venue). *Id.* at 960. The Court also expressly recognized that it was leaving unanswered the question whether "a party may waive the § 1407 remand requirement." *Id.* at 963, n.1.

The typical venue statute is "not a qualification upon the power of the court to adjudicate, but a limitation designed for the convenience of litigants, and, as such, may be waived by them." *Olberding v. Illinois Central Railroad Co.*, 346 U.S. 338, 340, 74 S.Ct. 83, 98 L.Ed. 39, 42 (1953). The statute at issue in this case, 28 U.S.C. § 1407(a), does establish venue for trial purposes in the district in which the cases were filed, but at the same time, it clearly imposes a "qualification upon the power of the court to adjudicate," by

limiting the transferee court's jurisdiction to "pretrial proceedings" and mandating that the cases be remanded for trial in the courts in which they were filed.

The lower federal courts are courts of limited jurisdiction. They can adjudicate only those cases authorized by the Constitution and by Act of Congress.

> All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to "ordain and establish" inferior courts, conferred on Congress by Article III, § 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate .... The Congressional power to ordain and establish inferior courts includes the power "of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."

Lockerty v. Phillips, 319 U.S. 182, 187, 63 S.Ct. 1019, 1022, 87 L.Ed. 1339 (1943). "[T]he federal courts are authorized to hear only those cases that Congress by statute authorizes them to hear." *Nolan v. Boeing Co.*, 919 F.2d 1058, 1064 (5th Cir. 1990). Here, Congress did not authorize the transferee court to hear the case, but expressly precluded it from doing so. "Courts cannot retain jurisdiction where Congress has taken it away." *Paige v. Cisneros*, 91 F.3d 40, 43 (7th Cir. 1996).

Section 1406(b) of Title 28 does not command a different result in this case. That subsection was meant only to codify the existing common law principle that objections

to venue are waivable, but waiver of a venue objection will not deprive the court of jurisdiction that has otherwise been conferred by Congress in keeping with Article III of the Constitution. (See Revision Notes and Legislative Reports comment on the 1948 Act following 28 U.S.C.A. § 1406). The flip side of that same coin is that the parties cannot, by waiver or otherwise, confer on the court jurisdiction which Congress has withheld. Where Congress has deprived a court of the power to act, the parties cannot, by consent, stipulation or waiver, restore that power to the court. *Bates v. Johnson*, 901 F.2d 1424, 1428-1429 (7th Cir. 1990); *Morongo Band of Indians v. California State Board of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). In enacting § 1407, Congress limited the jurisdiction of the transferee court to pretrial proceedings. The Supreme Court, in *Lexecon*, unequivocally held that the mandatory remand language of § 1407 left the transferee court powerless to transfer the case to itself for trial. Surely, if the court lacks jurisdiction to effect a self-transfer, the same mandatory remand language deprives the court of jurisdiction to try the cases.

Situations analogous to the one before the Court have been resolved by other courts. For instance, in *Silver v. Goodman*, 234 F.Supp. 415 (D.Conn. 1964), the parties entered into a written stipulation that the case before the court should be transferred to a federal court in New York. However, New York was not a venue in which the action could have been brought against the Connecticut defendant. The Connecticut district court held that 28 U.S.C. § 1404 only granted him the power to transfer a case to a district "where it might have been brought." The court then held that the issue was a jurisdictional one – whether the court had the power to transfer the case. *Id.* at 416-17. The court then reasoned that although the parties could by stipulation agree to a particular venue, they could not by stipulation confer on the court the power to transfer the case. In reaching this decision, the district court relied on the Supreme Court's

opinion in *Hoffman v. Blaski*, 363 U.S. 335, 80 S.Ct. 1084, 4 L.Ed.2d 1254 1960).

In *Blaski*, defendants argued that by moving for transfer to a district in which venue over them was improper, they had waived objection to venue in the proposed transferee court, and made that court one in which the action "might have been brought." The Supreme Court rejected this argument, holding that "the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant, but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff." *Blaski*, 363 U.S. at 343-44, 4 L.Ed.2d at 1262.

Likewise, in this case, the parties cannot confer on the court, by waiver or stipulation, jurisdiction to transfer these cases or jurisdiction to try them.

There Was No Waiver

Even if this Court should determine that the authority of the § 1407 transferee court to try these cases could be established by waiver, there was no waiver in this case. The Mississippi and California Plaintiffs filed their motion for suggestion of remand on February 6, 1996. The cases did not go to trial until twenty-eight days later on March 5, 1996.

Plaintiffs raised their objection to the action of the transferee court prior to trial, after the transferee court had reversed its twice-announced intention to send the cases back to California and Mississippi for trial, and at a time when, in the transferee court's own estimation trial was at least two weeks away. Plaintiff's also raised their objection in a motion to the JPML, and again on Petition for Writ of Mandamus to this Court. All of these actions were taken prior to the start of trial.

This case is factually indistinguishable from *Lexecon*. Lexecon filed its motion seeking remand for the first time five months after all the other parties had reached settlement. *Lexecon*, 118 S.Ct. at 960. It took all the other procedural steps to preserve the objection that Plaintiffs took in this case, with the exception that Lexecon did not petition the JPML for relief, whereas Plaintiffs herein took that step. *Lexecon*, 118 S.Ct. at 963.

Section 1407 is written to be self-executing. No motion by any party should be required to obtain remand. The Supreme Court resoundingly rejected the Ninth Circuit's reasoning that the JPML's rules prevented it from remanding Lexecon's case, because there had been no suggestion of remand from the trial court or motion filed directly with the panel. In doing so, the Supreme Court said that this line of reasoning "ignores the fact that the statute places an obligation on the Panel to remand no later than the conclusion of pretrial proceedings in the transferee court, and no exercise in rule making can read that obligation out of the statute." *Lexecon*, 118 S.Ct. at 962-63. In other words, the statute absolutely requires that the JPML remand the cases transferred under it, and the panel cannot avoid that obligation by making rules requiring either the transferee court or the parties to take some action to trigger that requirement.

There Is No Retroactivity Problem

The Defendants may argue that *Lexecon* should not be given retroactive application, in reliance on *Shah v. Pan American World Services, Inc..*, 148 F.3d 84 (2nd Cir. 1998). The Court should reject that argument.

In *Harper v. Virginia Dept. of Taxation* , 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993), the Supreme Court made clear that the law regarding retroactive application of its decisions had changed dramatically since the days of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). In *Harper* the Court held that "this Court's application of a rule of law to the parties before the Court requires every court to give retroactive effect to that decision." *Harper*, 509 U.S. at 90, 125 L.Ed.2d at 81. In the course of the opinion, the Court quoted from its decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439,115 L.Ed.2d 481 (1991), to the effect that the decisions of the Supreme Court on federal law were to be given retroactive effect unless the Supreme Court had, in the opinion announcing the new rule of law, "explicitly 'reserve[d] the question whether its holding should be applied to the parties before it." *Shah*, 148 F.3d at 91 (quoting *Beam Distilling*, 501 U.S. at 539). The Second Circuit stated that in *Lexecon*, the Supreme Court had explicitly reserved the question. As evidence of this explicit reservation, the court cited to footnote 5 in the *Lexecon* opinion. In that footnote, the Supreme Court said nothing more than that it would not address that issue, because the defendants had not raised it either in the Ninth Circuit, or in their opposition to the petition for writ of certiorari. Rather than explicitly reserving the issue, the Court said that the defendants had waived it.

The Second Circuit went on to state that the Supreme Court had not applied the "new" rule announced in *Lexecon* to the parties before it in that case. This is clearly incorrect. After announcing its decision that a § 1407 transferee court was entirely without power to transfer a case to itself for all purposes, the Supreme Court expressly held that Lexecon was entitled to a remedy. *Lexecon*, 118 S.Ct. at 965-966. The Court then remanded the case to the Ninth Circuit for further proceedings consistent with its opinion. Lexecon, plaintiff below, had been forced to trial in the § 1407

transferee court and lost. If the Supreme Court was not applying its decision to the parties before it, there would have been no reason for it to hold that Lexecon was entitled to a remedy or to remand the case. The Supreme Court's directive that on remand the lower courts were to conduct further proceedings "consistent with this opinion" was a clear directive that those courts were to apply the decision announced in *Lexecon* to the parties. The Ninth Circuit did so. *Lexecon* was decided on March 3, 1998. On April 6, 1998, the Ninth Circuit panel entered an order remanding the case to the Arizona district court with instruction that it was to refer the case to the JPML for remand. (A copy of the Ninth Circuit Order is attached.)

Because the Supreme Court clearly did not "explicitly reserve the question whether its holding should be applied to the parties before it," but, in fact, applied that decision to those parties, *Harper* mandates that the *Lexecon* decision be given retroactive application.

Other courts have recognized that *Lexecon* is to be applied to cases before them. *See In the Matter of Rhone-Poulenc Rorer Pharmaceuticals, Inc.*, 138 F.3d 695, 696 (7th Cir. 1998); *In re Ford Motor Co. Bronco II Product Liability Litigation*, 1998 WL 308013 (E.D.La. June 8, 1998).

Even if this were a case in which engaging in a *Chevron Oil v. Huson* analysis was appropriate, the Court should still rule in favor of retroactive application. Concerns with retroactive application of a decision come into play only when the Court announces a new rule of law, and application of that new rule to the parties would result in injury to one of those parties due to that party's having acted in reliance on the old rule. Section 1407 has been the law since its enactment and has always contained the unequivocal command that transferred cases be remanded for trial. The Supreme Court has announced no new rule of law in

Lexecon. More importantly, there is no rational way in which the Defendants can be said to have taken action in reliance on the "old" rule of law.

Finally, the Defendants did not raise a retroactivity objection when this issue was raised before the district court, before the JPML, before this Court on petition for writ of mandamus, before this Court on direct appeal, or before the Supreme Court in opposing the petition for writ of certiorari. They cannot raise it now. *Lexecon*, 118 S.Ct. at 966, n. 5.

Conclusion

Lexecon clearly establishes the proposition that a district court to which cases are transferred pursuant to 28 U.S.C. § 1407 is without jurisdiction to transfer the cases to itself for trial. By mandating that the cases be remanded at the conclusion of the pretrial process, the statute clearly deprives the transferee court of jurisdiction to try the cases. The power to adjudicate cannot be conferred by the parties or by the court itself. Because the United States District Court for the Middle District of Florida was without jurisdiction to try these cases, the judgment entered against Plaintiffs must be reversed and (1) this Court should remand these cases to the district court with instruction that the district court notify the JPML that they are ready to be remanded to the courts in which they were filed; or (2) this Court should itself inform the JPML that the cases are ready to be remanded for trial.

Respectfully submitted, this 28th day of January, 1999,

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This the _____ day of January, 1999.

Richard L. Jones

No. 00-1122

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

B.C. ROGERS PROCESSORS, INC., B.C. ROGERS POULTRY, INC., CHOCTAW MAID FARMS, INC., FOREST PACKING COMPANY, INC., MARSHALL DURBIN, INC., MARSHALL DURBIN FOOD CORPORATION, MARSHALL DURBIN POULTRY, INC., MARSHALL DURBIN OF TUPELO, INC. AND MOHAWK PACKING COMPANY,

Petitioners,

v.

THE BOC GROUP, INC., LIQUID AIR CORPORATION AND LIQUID CARBONIC INDUSTRIES CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Mississippi and California Opt-Out Plaintiffs ("Petitioners") waived their objections to a trial in the United States District Court for the Middle District of Florida by (i) agreeing during pretrial proceedings and in the Final Pretrial Order that this action would be tried in the Middle District of Florida, and (ii) failing to object to venue until the day the trial was scheduled to begin?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are correctly described in the Petition.

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OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed *per curiam* the judgment of the Middle District of Florida without opinion. This affirmance is reported *sub nom. State of Florida v. Liquid Air*, 136 F.3d 139 (11th Cir. 1998). The unpublished orders of the Middle District of Florida are included in the Appendix to the Petition.

This Court granted *certiorari*, vacated the Eleventh Circuit decision and remanded the case to the Eleventh Circuit for further consideration in light of *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). *B.C. Rogers Processors, Inc. v. BOC Group, Inc.*, 524 U.S. 947 (1998). After reconsideration, the Eleventh Circuit affirmed the judgment of the Middle District of Florida. *In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d 1321 (11th Cir. 2000).

STATEMENT OF JURISDICTION

Certiorari is not appropriate because the Eleventh Circuit's decisions do not conflict with an applicable decision of this Court. Sup. Ct. R. 10(c).

STATUTE INVOLVED

The statutory provision involved in this response is 28 U.S.C. § 1406(b), which provides: "Nothing in this chapter shall impair the jurisdiction of a district court of

any matter involving a party who does not interpose timely and sufficient objection to venue."

STATEMENT OF THE CASE

The history ~~of this case~~ shows Petitioners failed to "interpose [a] timely and sufficient objection to venue" as required by 28 U.S.C. § 1406(b). On the contrary, they repeatedly consented to venue.

On April 22, 1992, the State of Florida filed a civil antitrust suit against Liquid Carbonic Industries Corporation, The BOC Group, Inc., and Liquid Air Corporation ("Respondents") in the United States District Court for the Middle District of Florida ("District Court" or "Middle District of Florida"). Thereafter, over a dozen "tag-along" actions were filed in the District Court and elsewhere. The California Plaintiff filed suit in the United States District Court for the Northern District of California and the Mississippi Plaintiffs filed suit in the United States District Court for the Southern District of Mississippi.[1] In 1992, the Judicial Panel on Multidistrict Litigation transferred all tag-along actions to the Middle District of Florida for coordinated pretrial proceedings. (Pet. at 4).

Petitioners filed amended complaints in the Middle District of Florida. On October 20, 1993, the California

[1] Counsel for the California Plaintiff had previously filed suit on behalf of Foster Poultry Farms Co. ("Foster Poultry") in the Middle District. For this reason, Foster Poultry is not a party to the Petition. (Pet. at ii).

Plaintiff filed its First Amended Complaint in that district, asserting jurisdiction and venue were proper under 28 U.S.C. § 1331. (R. 737-16). Likewise, on April 1, 1994, the Mississippi Plaintiffs filed their First Amended Complaint in the Middle District of Florida. (R. 965-13).

At a pretrial hearing on January 12, 1994, the District Court set a trial date for September 1995 in Orlando, Florida. (R. 2-312). In May 1995, the District Court rescheduled the trial to February 5, 1996 in Orlando. (R. 3-603-1). The District Court also set a final pretrial schedule including the dates for designating trial witnesses and serving final expert reports. Petitioners' counsel did not object to venue or suggest the cases should be transferred. (*Id.*).

Throughout the final pretrial stage, Petitioners continued to prepare for a trial in Orlando. (R. 10-918-1; R. 10-919-1; R. 10-920-1; R. 10-921-1). The parties submitted final expert reports in May 1995. In June, the parties exchanged trial witness summaries, including 18 witnesses affiliated with Petitioners. The final round of pretrial discovery, including depositions of Petitioners' employees, ended in November 1995.

During this time, Plaintiffs never objected to venue in Orlando. In fact, the Mississippi Plaintiffs opposed The BOC Group, Inc.'s motion for separate trials. (R. 3-640-8). They argued that the trial should be "consolidated," that no prejudice would result from a consolidated trial, and that separate trials would not serve the "goals of expeditiousness [and] economy." (*Id.*)

On August 9, 1995, the District Court ordered the parties to prepare a pretrial order by December 7, 1995.

(R. 3-641). In the Final Pretrial Order, which all parties signed, Petitioners consented to the District Court's exercise of personal jurisdiction and agreed venue was proper in the Middle District of Florida:

> *This Court has jurisdiction of the matters complained of* under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 16 and 26). It also has jurisdiction under 28 U.S.C. § 1337. The Court has supplemental jurisdiction over Florida's state law claims pursuant to 28 U.S.C. § 1367. *Venue is proper under 28 U.S.C. § 1391.*

(R. 3-740-25) (emphasis added).

On December 11, 1995, the District Court approved the Final Pretrial Order, confirmed the trial date of February 5, 1996 in Orlando and set hearings on pending motions. (R. 4-771). The District Court also set a date for the submission of motions *in limine* and ordered that it would hear those motions in Orlando on February 2, 1996, the Friday before trial. *Id.* Petitioners' counsel participated in this hearing and did not object to jurisdiction or venue.

On February 2, 1996, the District Court held a day-long hearing on various trial-related motions. (R. 11-953). Petitioners' counsel participated in this hearing and again did not object to venue. Petitioners also submitted proposed jury instructions and objected to Respondents' proposed jury instructions. (R. 11-944).

In the days before trial, various parties settled. Ultimately, the last group of plaintiffs other than Petitioners resolved its claims on February 5, the morning trial was

scheduled to begin. (Pet. at 5). Later that morning, Petitioners and Respondents appeared before the District Court to select a jury and present opening statements. Upon learning they were the only remaining plaintiffs, Petitioners for the first time moved the District Court to transfer the cases to Mississippi and California.[2] (R. 12-991). Their motion was denied.[3] (Pet. App. at 22a; R.

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[2] Hoping to free ride on the work of the other opt-out plaintiffs, Petitioners did little to prepare for trial. In response to Petitioners' writ of *mandamus*, Petitioners' co-plaintiffs documented this strategy:

> In the fall of 1993, shortly after [P]etitioners opted out . . . counsel for [P]etitioners were invited to participate in the discovery efforts that the State of Florida, the class and [certain opt-outs] had undertaken jointly to share costs, but [P]etitioners refused to pay their fair share of the joint costs. [Certain opt-outs] counsel made it clear at that time that [P]etitioners' decision meant that [P]etitioners were not entitled to share the work product of the other plaintiffs. . . . If [certain opt-outs] ha[d] a "vastly superior position with regard to control of the documents and witnesses" ([Mand.] Br. 20) . . . it was because of their trial preparation. Nothing prevented [P]etitioners from doing their own work.

In re B.C. Rogers, et al., No. 96-2179, Dkt. 2/22/96, at 3-4 (emphasis added).

[3] The District Court chided Petitioners after they claimed shock over a trial in Orlando on the date scheduled nine months earlier:

> So that the notion that some calamity has befallen you at my instance, and is sort of irredeemable, almost, is really not born out by the fact that all of this is the result of circumstances that took place in about a two or two and a half hour span, at the most. . . .

(R. 20-32-34; R. 20-33-34).

20-6-56). Petitioners then unsuccessfully sought a writ of *mandamus* in the Eleventh Circuit.

The trial finally began on March 5 and continued until March 21. After deliberating for less than three hours, the jury returned a verdict for Respondents. (R. 15-1062-1-27; R. 15-1063-1). Petitioners then sought appellate review. In their Eleventh Circuit briefs, Petitioners never claimed the District Court lacked jurisdiction or venue. Instead, they argued convenience:

> Plaintiffs do not contend that venue was not proper under Section 1391. The Middle District of Florida was a district in which these cases could have been brought. . . . [B]ut . . . there are other districts where trial would be more convenient for the parties and witnesses.

(Pet. App. Reply at 13-14).

On January 29, 1998, the Eleventh Circuit unanimously affirmed the District Court's judgment. *State of Florida v. Liquid Air*, 136 F.3d 139 (11th Cir. 1998). Petitioners filed a petition for writ of *certiorari* to this Court, arguing the Eleventh Circuit decision directly conflicted with this Court's decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). This Court granted *certiorari*, vacated the Eleventh Circuit decision and remanded the case to the Eleventh Circuit for further consideration in light of *Lexecon. B.C. Rogers Processors, Inc. v. BOC Group, Inc.*, 524 U.S. 947 (1998).

After reconsideration, the Eleventh Circuit again unanimously affirmed the judgment of the Middle District of Florida. *In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d 1321 (11th Cir. 2000). In particular, the appellate

court found "[f]ar from requesting that their cases be remanded to the districts in which they were filed, [Petitioners'] position . . . was that the cases should be tried in Orlando." *Id.* at 1325. Recognizing plaintiffs' right to waive venue, the Eleventh Circuit held: "Having induced the court to rely on a particular erroneous proposition of law or fact, a party in the normal case may not at a later stage of the case use the error to set aside the immediate consequences of the error." *Id.* at 1326 (citations omitted).

The Eleventh Circuit thus distinguished this case from *Lexecon*:

> [A]ppellants' actions throughout pretrial proceedings make this case clearly distinguishable from *Lexecon*. Lexecon requested remand early in the case, insisted that proper venue lay in the Northern District of Illinois (where the case had been filed), and "continuously objected to an uncorrected categorical violation of the [section 1407] mandate," *Lexecon*, 523 U.S. at 43, 118 S. Ct. at 966, when the District Court refused to issue a suggestion of remand. Conversely, appellants in the instant case not only failed to raise the issue of remand until the day of jury selection, but actually stipulated that venue was proper in the Middle District of Florida and consistently urged the District Court to try the case in Orlando.

Id. at 1326-27.

Petitioners filed this petition for writ of *certiorari* on January 8, 2001.

ARGUMENT

THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *HOFFMAN* OR *LEXECON*

Petitioners' concession that Section 1407 is "clearly a venue statute" is fatal to their claim that the "Eleventh Circuit has ruled in a manner that is inconsistent" with this Court's previous decisions. (Pet. at 10, 9).[4]

Since the early 1920s, this Court has held that parties may waive statutory restrictions on venue. *See General Inv. Co. v. Lake Shore & Michigan Southern Ry.*, 260 U.S. 261, 275 (1922) (statute limiting venue in federal question removal cases "merely regulates the place of suit, its purpose being to save defendants from inconvenience"; statute granted "a privilege which they may, and not infrequently do, waive"); *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653, 655 (1923) (venue provision in removal statute "does not limit the general jurisdiction of the District Courts or withdraw any suit therefrom, but merely confers a personal privilege on the defendant, which [it] may assert, or may waive, at [its] election"); *Olberding v. Illinois Cent. R.R. Co.*, 346 U.S. 338, 340 (1953) ("plaintiff, by bringing the suit in a district other than that authorized by the statute, relinquished [its] right to object to the venue."); *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979) (venue is a privilege which may be waived).[5]

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[4] In *Lexecon*, this Court held Section 1407 is "a venue statute." 523 U.S. at 42.

[5] Section 1406(b) also explicitly provides that any party may waive venue: "Nothing in this chapter shall impair the

In *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-68 (1939), this Court explained why statutory venue restrictions are not jurisdictional and may be waived:

> The jurisdiction of the federal courts – their power to adjudicate – is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit – the place where judicial authority may be exercised – though defined by legislation relates to the convenience of litigants and as such is subject to their disposition.
>
> * * * *
>
> Being a privilege, it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct.

Relying on this principle, the Eleventh Circuit held Petitioners waived their objections to venue. *In re Carbon Dioxide Antitrust Litig.*, 229 F.3d at 1325-26, *citing Neirbo*, 308 U.S. at 168 and *Olberding*, 346 U.S. at 340. In particular, it denied Petitioners' eve-of-trial request for transfer "[b]ecause [Petitioners] explicitly requested that the district court try their cases. . . . " *Id.* at 1322. "Far from requesting that their cases be remanded to the districts in which they were filed, [Petitioners'] position . . . was that the cases should be tried in Orlando." *Id.* at 1325. Thus, the Eleventh Circuit concluded Petitioners had waived any objection to venue:

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jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to venue." 28 U.S.C. § 1406(b).

> If [Petitioners] believed that they had a right to have their cases remanded to their original districts, they should not have asked the court to try the case in Orlando. "Having induced the court to rely on a particular erroneous proposition of law or fact, a party in the normal case may not at a later stage of the case use the error to set aside the immediate consequences of the error."

Id. at 1326, *citing Charter Co. v. United States*, 971 F.2d 1576, 1582 (11th Cir. 1992) (internal citation omitted).

Contrary to Petitioners' argument, *Hoffman v. Balski*, 363 U.S. 335 (1960), is inapposite. In *Hoffman*, this Court addressed whether the phrase "where it might have been brought" in 28 U.S.C. § 1404(a) "should be held to relate not only to the time of the bringing of the action, but also to the time of the transfer. . . . " 363 U.S. at 342.[6] Despite the plaintiffs' opposition, the *Hoffman* defendants had attempted to transfer the action to a venue where plaintiffs could not have originally filed. Defendants argued they could waive venue to make the transferee court one where the plaintiff could bring the action. *Id.* This Court, however, rejected defendants' contention that "where it might have been brought" means "where it may now be rebrought, with defendants' consent." *Id.* Relying on Section 1404(b)'s plain meaning, the Court required the transferee court be one in which the plaintiff could have originally brought the action.

---

[6] Section 1404(a) provides "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

Thus, the *Hoffman* Court simply held that a party cannot force a transfer to an improper venue over the timely objection of the other party. 335 U.S. at 343-44. Nothing in *Hoffman* precludes *both* plaintiffs and defendants from consenting to venue. In fact, the Court reiterated that "venue, like jurisdiction over the person, may be waived . . . by failing seasonably to assert it, or even simply by making default." *Id.* at 343, *citing Neirbo.*

Unlike the *Hoffman* plaintiffs, Petitioners repeatedly consented to both jurisdiction and venue in the Middle District of Florida. They filed amended complaints there. (R. 737-16; R. 965-13). They signed the Pretrial Order, consenting to venue there. (R. 3-740-25). They submitted jury instructions and filed motions *in limine* for a consolidated trial. (R. 4-771; R. 11-953; R. 11-944). And, on the day of trial, they walked into court ready to pick a jury and make opening arguments.

Petitioners' waiver also distinguishes this case from *Lexecon*. As the Eleventh Circuit explained:

> [A]ppellants' actions throughout pretrial proceedings make this case clearly distinguishable from *Lexecon*. Lexecon requested remand early in the case, insisted that proper venue lay in the Northern District of Illinois (where the case had been filed), and "continuously objected to an uncorrected categorical violation of the [section 1407] mandate," *Lexecon*, 523 U.S. at 43, 118 S. Ct. at 966, when the District Court refused to issue a suggestion of remand. Conversely, appellants in the instant case not only failed to raise the issue of remand until the day of jury selection, but actually stipulated that venue was proper in the Middle District of Florida and

> consistently urged the District Court to try the case in Orlando.

229 F.3d at 1326-27.

Lexecon does not affect waiver under Section 1406(b). To the contrary, it teaches that "a statute is to be considered in all its parts when construing any one of them" and that courts must apply the plain meaning of a statute. 523 U.S. at 36. Under the plain meaning of Section 1406(b), a party may waive venue under any section of that chapter, including of Section 1407. 28 U.S.C. § 1406(b). In fact, this Court noted in *Lexecon* that "a party may waive the § 1407 remand requirement" under Section 1406(b). *Lexecon*, 523 U.S. at 36, n.1.

CONCLUSION

Lexecon and *Hoffman* do not conflict with the Eleventh Circuit's opinion. Petitioners did not "interpose [a] timely and sufficient objection to venue" as required by 28

U.S.C. § 1406(b). Accordingly, Respondents respectfully request this Court to deny Petitioners' Petition for Writ of *Certiorari*.

Respectfully submitted,

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